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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-

JERRY EDWIN HOLCOMBE,

*Petitioner,*

*-vs-*

THE STATE OF SOUTH CAROLINA,

*Respondent,*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

J. D. TODD, JR.
Post Office Box 2248
Greenville, South Carolina 29602

HENRY F. FLOYD
Post Office Box 978
Pickens, South Carolina 29671

*Attorneys for the Petitioner*

## QUESTION PRESENTED

Did the Supreme Court of South Carolina in upholding a charge to the jury by the trial Judge that a man intends the natural and probable consequences of his act violate petitioner's Fourteenth Amendment right to due process under the law in that such instruction shifted the burden of proof of the issue of intent to the defendant, contrary to the holding of this Court in *Sandstrom v. State of Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39?

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# IN THE SUPREME COURT OF THE UNITED STATES

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| JERRY EDWIN HOLCOMBE, *Petitioner,* | ) | **PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA** |
| *vs.* | ) | |
| THE STATE OF SOUTH CAROLINA, *Respondent.* | ) | |

Jerry Edwin Holcombe respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in the above entitled case.

## OPINIONS BELOW

The Opinion of the Supreme Court of South Carolina filed February 5, 1981 (Appendix 6) is not reported, it being a Memorandum Opinion issued under Rule 23 of the Rules of the Supreme Court of South Carolina as Opinion No. 81-MO-21. The Order of the Supreme Court of South Carolina denying rehearing (Appendix 7), dated March 24, 1981, is not reported.

## JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on February 5, 1981. The Order of the Supreme Court of South Carolina denying a timely Petition for Rehearing was entered on the 24th day of March, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTION PRESENTED

Did the Supreme Court of South Carolina in upholding a charge to the jury by the trial Judge that a man intends the natural and probable consequences of his act violate petitioner's Fourteenth Amendment right to due process under the law in that such instruction shifted the burden of proof of the issue of intent to the defendant, contrary to the holding of this Court in *Sandstrom v. State of Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39?

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment Fourteen, Section 1, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner, Jerry Edwin Holcombe, was convicted of the murder of Amy Swafford by a jury of the Court of General Sessions of Oconee County, South Carolina, on October 20, 1979, and he was then sentenced to life imprisonment by the Honorable William H. Ballenger, Circuit Judge, after motions for judgment notwithstanding the verdict and new trial were denied.

Thereafter, petitioner filed timely appeal to the Supreme Court of South Carolina, which Court affirmed the judgment of the lower Court in what is known as a Memorandum Opinion merely stating the Court was of the opinion that no error of law was present and that a full written Opinion would be without precedential value.

Thereafter, Petition for Rehearing was filed on the 12th day of February, 1981 and subsequently denied without comment on the 24th day of March, 1981.

Amy Swafford was the four-year-old daughter of Mr. and Mrs. Claude Swafford. Petitioner had engaged in an extra-marital affair with Mrs. Swafford for approximately a year, and after an argument on the telephone with Claude Swafford,

petitioner went to the Swafford home in his pickup truck. Mr. Swafford, Mrs. Swafford and Amy were in the carport, and there was one discharge of a shotgun from petitioner's truck. One pellet hit the child, resulting in her almost instantaneous death. No one else was injured.

Petitioner contended the discharge was an accident while the State contended it was a malicious and intentional discharge.

The Circuit Court charged the jury "that a man intends the natural and probable consequences of his act." Page 277, Lines 8 and 9, Transcript of Record, Supreme Court of South Carolina. Petitioner made timely and proper objection to such charge as being contrary to the decision of this Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, to which the Circuit Judge replied, "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not." Page 286, Lines 22 and 23, Transcript of Record, Supreme Court of South Carolina.

## WHY THE WRIT SHOULD BE GRANTED

Petitioner respectfully submits that the Supreme Court of South Carolina has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court. Petitioner asserted at the trial level, at the appellate level in the Supreme Court of South Carolina, and in Petition for Rehearing that rights guaranteed to him by the Constitution of the United States had been violated by the charge of the trial Judge that "Now I charge you that it is an axiom of the law that one intends the probable and natural consequences of his act." (Appendix 8). Objection to such charge was promptly and properly taken by petitioner. (Appendix 9). Such objection was preserved by proper Exception to the Supreme Court of South Carolina. (Appendix 10).

Such a charge was specifically condemned by this Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L. Ed.2d 39. Such a charge has been condemned by numerous Courts, as cited in Footnote 3. The jurors were only told that the law presumed that a person intended the natural and

probable consequences of his act. Certainly, as is said in *Sandstrom*, ". . . there is a 'risk' that the jury, once having found petitioner's act voluntary, would interpret the instruction as automatically directing a finding of intent." The trial Judge did not tell the jury that such presumption could be rebutted at all. As this Court said in *Sandstrom*, "First, a reasonable jury could well have interpreted the presumption as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent." Further in *Sandstrom* this Court stated: "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations." This Court then determined that such an instruction constituted constitutional error.

Despite the fact that this decision, almost on all fours with the instant case, was presented to the Circuit Judge, he ignored the decision of the highest Court in the land, stating, with no effort to distinguish the cases or to explain why the decision was not applicable: "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not."

On appeal the Supreme Court of South Carolina did not attempt to distinguish petitioner's case from *Sandstrom*, nor did it offer petitioner any reason as to why *Sandstrom* did not apply, but merely filed a Memorandum Opinion to the effect that no error of law appeared. This despite the fact that the Supreme Court of South Carolina in *South Carolina v. Woomer*, in Opinion No. 21442 filed April 28, 1981, stated: "No principle of law is more firmly established than the solemn duty of the court to determine the law of the case and declare it to the jury. That jury is bound by, and must accept

and be governed by, the instructions of the court." Such a cavalier treatment of the constitutional rights of petitioner is inexplicable. In view of the way in which this matter has been handled, petitioner does not know whether the Supreme Court of South Carolina approved Judge Ballenger's statement that "If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not." or whether the Supreme Court of South Carolina considered the charge harmless error. In connection with that, we respectfully submit that an unconstitutional jury instruction could hardly constitute harmless error, but certainly, if that is what the Supreme Court of South Carolina meant to say, it should have said so and informed petitioner of such. Constitutional issues properly presented to the Court must be disposed of so that citizens may know that their constitutional rights have been considered and why they are not accorded the protection required by this Court. Although it is impossible to determine the reasons for the affirmance of the judgment of the Court of General Sessions by the Supreme Court of South Carolina, it is respectfully submitted that such Court has either ignored a Federal question of substance which was properly before it or decided a Federal question of substance in a way not in accord with the applicable decisions of this Court, namely, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the Writ should issue to the Supreme Court of South Carolina.

Respectfully submitted,

J. D. TODD, JR.
Post Office Box 2248
Greenville, S.C. 29602

HENRY F. FLOYD
Post Office Box 978
Pickens, S.C. 29671

*Attorneys for Petitioner*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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The State ..... *Respondent,*

v.

Jerry Edwin Holcombe ..... *Appellant.*

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Appeal From Oconee County
William H. Ballenger, *Judge*

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Memorandum Opinion No. 81-MO-21
Filed February 5, 1981

AFFIRMED

Henry F. Floyd, of Acker, Acker, Floyd & Welmaker, of Pickens, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorneys General Kay G. Crowe and Lindy Pike Funkhouser, all of Columbia; and Solicitor L. Henry Raines, II, of Anderson, for respondent.

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PER CURIAM: Appellant was convicted of murder and sentenced to life imprisonment.

After a careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

| | |
|---|---|
| s/ J. Woodrow Lewis | C.J. |
| s/ Bruce Littlejohn | A.J. |
| s/ J. B. Ness | A.J. |
| s/ George T. Gregory, Jr. | A.J. |
| s/ David W. Harwell | A.J. |

# The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

March 24, 1981

Henry F. Floyd, Esquire
Messrs. Acker, Acker, Floyd & Welmaker
P. O. Box 978
Pickens, South Carolina 29671

Re: The State v. Jerry Edwin Holcombe

Dear Mr. Floyd:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J."

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/rl

cc: The Honorable Lindy P. Funkhouser

## CHARGE OF THE TRIAL JUDGE

**(Page 277, Lines 8 and 9, Transcript of Record, Supreme Court of South Carolina)**

Now I charge you that it is an axiom of the law that one intends the probable and natural consequences of his act.

## OBJECTION TO CHARGE OF TRIAL JUDGE
(Page 286, Lines 16-23, Transcript of Record, Supreme Court of South Carolina)

FLOYD:

We take exception to the charge with respect that a person — that he intends the natural and probable consequences of his act. The exception based upon the case of Sandstrom versus Montana - - -

COURT:

If the United States Supreme Court wants to overrule our law, I will let them do it, sir. I will not.

## EXCEPTION 9 TO THE SUPREME COURT OF SOUTH CAROLINA

(Page 313 of the Transcript of Record)

9. The trial court erred in charging the jury that a man intends the natural and probable consequences of his acts in that such charge shifted the burden of proof to Appellant in contravention of the constitutions of the United States and of the State of South Carolina.